No. 83-1886

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

DAVID M. NEWMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

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I.

The government's lead-off argument In Opposition posits that the facts of the case do "not plainly [present]" petitioner's legal claim. Opp. 3. This argument is, however, clearly erroneous because the record unambiguously establishes that the district court accepted petitioner's guilty plea *and* deferred decision on whether to accept or reject the plea agreement.[1]

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[1] A course contemplated by Rule 11(e)(4).

In limine, petitioner fully endorses the government's contention that when a district court enters a judgment of guilty on the plea, this is "tantamount to accepting the agreement as well as the plea;" Opp. 3, a well established rule in the D.C. Circuit. *United States v. Blackwell,* 694 F.2d 1325 (D.C. Cir. 1982). Application of this rule, however, presupposes the absence of a contrary intent by the court; the very countervailing factor indelibly presented by the record and carefully omitted from the Opposition.

1. At the time the plea was accepted, the district judge admonished petitioner that he was free to either "accept this plea agreement [or] . . . I could reject it." Tr. I 8. A rather clear indication of the court's intent to defer decision thereon. An intent corroborated by the judge's further inquiry whether or not petitioner was "willing to submit to [an] interview by the probation officer?" Tr. I 8. A permission not normally requested when a plea is entered unless acceptance of the agreement is deferred pursuant to Rule 32(c)(1). Furthermore, this is the very context wherein judges traditionally delve deeper before accepting the agreement, *i.e.,* when a plea is permitted to a minor cocaine felony possession in exchange for the mandatory dismissal of a far more serious P.C.P. conspiracy indictment grounded in a wiretap — a tap the court was initially asked to approve.

2. At the hearing on the motion to withdraw the plea, the district judge who was well acquainted with the *Blackwell* rule[2] could have ended the matter then and there by simply declaring that when the plea was accepted, the

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[2]The court observed during the hearing:

> "[S]ince a plea agreement is an integral part of most guilty pleas, the acceptance of the plea represents, by implication at least, the acceptance of that agreement." Tr. II 25-26.

court thereby also intended to accept the plea agreement. Since that was obviously not his intention at the time, having deferred decision thereon, the court rejected application of this theory to the facts and denied withdrawal of the plea on the following far different ground:

> "Insofar as the Rule 11 'conditional plea' argument is concerned, I conclude that the withdrawal of a plea is permitted of right only if the court rejects the agreement and that I am permitted to accept or reject that agreement both before or after it (the guilty plea) is accepted. And I hereby state on the record that I accept the agreement as made, that it was freely and voluntarily made on the basis of the evidence before me and I decline to allow the plea to be withdrawn on that ground." Tr. II 43-44.

II.

Facing the issue squarely, the government contends that when a guilty plea is entered and the court defers decision on whether to accept or reject the plea agreement, a defendant is bound by that executory agreement until and unless the court rejects it. The instant ruling, which rests upon this theory, collides head-on with *United States v. Ocanas,* 628 F.2d 353 (5th Cir. 1980). In upholding the government's right to repudiate the plea agreement in *Ocanas* the court observed:

> "Thus, the realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely on the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore

> reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court." 628 F.2d 358.

In attempting to sidestep the conflict, the government first announces that it "[does] not agree with this general rule . . ." (Opp 5 n.4). Hardly persuasive reasoning. It follows this up by characterizing *Ocanas* as a case wherein the government was "*permitted* to withdraw from the plea agreement." (Opp. 5) (Emphasis in original). To support this misreading of the *opinion,* facts are adduced which are not reported in F.2d. While the court of appeals could conceivably have narrowed its ruling as the government wishes it had, the opinion disregarded these proffered facts to achieve a more broadly stated "general rule." It is certainly not counsel's awesome task to augur what might have been based upon a recast record, and we have no doubt that assistant U.S. attorneys throughout the land freely cite the unabridged general rule of *Ocanas* to support superseding indictments and other unilateral judicially unapproved withdrawals from plea agreements.[3] To paraphrase Voltaire: We cannot hear what the government now says, because what the court did in *Ocanas* speaks so loudly. At bottom, the government's attempt to rewrite the *Ocanas* opinion does not obviate the conflict.

Moving on, the government cites *Mabry v. Johnson*, No. 83-328 (June 11, 1983) to support its claim that after entry of a plea, neither of the parties has, as a matter of right, the privilege to withdraw from the plea bargain.

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[3]Indeed, when the United States withdraws, it believes that less restrictive rules apply. In that circumstance, a defendant's "constitutional rights are fully vindicated if his guilty plea is vacated and he is free to replead or stand trial." Amicus Br. 25, *Mabry* v. *Johnson, infra.*

(Opp. 4) This conclusion is tempered by the statement that *Mabry* only "suggests" this result. (Opp. 4) We, however, read *Mabry* as strongly supporting our theory because the Court characterized a plea bargain as "a mere executory agreement which, *until embodied in the judgment of a court,* does not deprive an accused of liberty or any other constitutionally protected interest." (Footnote omitted) The Court added, that it is only when a plea bargain results in a guilty plea and conviction that the Constitution is implicated. Under the federal rules that can only occur if the court accepts the plea bargain and thereby binds the parties – regardless of whether or not it accepts the plea. Since the sentence is the conviction, there can be no sentencing until and unless the plea bargain has been accepted and "[embodied] in the judgment and sentence [of the court]." Rule 11(3). We fail to see, therefore, how a guilty plea standing alone can bind the parties to an executory plea bargain not yet judicially approved. Accord, *Mabry v. Johnson, supra.*

CONCLUSION

At the very least the instant case presents a conflict in the circuits and a serious unresolved issue under the federal rules which should be resolved.

Respectfully submitted,

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